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71-1692

No.

Supreme Court, U. S.
FILED
JUN 26 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

STEVE ANNORENO, ANTHONY SPILLONE, VITO SPILLONE, LOUIS DE RIGGI, JOHN KOBYLARZ, ALBERT MILSTEIN, GEORGE VERTUCCI, ANTHONY DELGALLO and MARTIN BUCARO,

Petitioners,

VS.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners, Steve Annoreno, Anthony Spillone, Vito Spillone, Louis DeRiggi, John Kobylarz, Albert Milstein, George Vertucci, Anthony Delgallo and Martin Bucaro, pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on May 26, 1972.

OPINION BELOW

The opinion of the Court of Appeals (not yet reported) is reprinted as Appendix A, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether convictions for conspiracy to make extortionate extensions of credit may be based, in substantial part, upon the testimony of debtor-witnesses as to the usurious nature of their loans, without testimony of fear of reprisal in the event of non-repayment of these loans; further, whether such convictions may be based upon the testimony of some debtor-witness as to their subjective beliefs of fear of reprisal, where those beliefs are not the result of any word or deed of the lenders; further, whether such convictions may be based upon the testimony of other debtor-witnesses as to their fears of reprisal, where those beliefs are the result of words or deeds of the lenders at a time subsequent to the making of the loans rather than at the time the loans are made; further, whether due process of law requires, in a prosecution for conspiracy to make extortionate extensions of credit, that the defendants be given a bill of particulars identifying those persons to whom they are alleged to have made such loans?

2. Whether a definitive limiting instruction must be given to the jury at the time evidence of pre-statutory activities of the defendants is admitted in evidence, where such evidence is offered ostensibly to show the formation of the alleged agreement, its nature and its scope?

3. Whether a full and fair hearing into the question of taint from the Government's admittedly illegal electronic eavesdropping activities requires full disclosure to the defense of all uses made of intelligence obtained thereby, including inspection of tainted and potentially tainted reports, identification of all recipients of such reports, and an opportunity to inquire further into dissemination of such reports or the contents of such reports?

4. Whether a hearing must be conducted to resolve factual issues raised by a motion to suppress non-contraband evidence not described in a second warrant, but seized (1) from the premises following execution of the warrant, and (2) from the person of the party arrested during execution of the warrant following his being taken from the premises to FBI offices?

STATUTES INVOLVED

Title 18, Section 371, United States Code, provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> • • •

Title 18, Section 891, United States Code, provides in pertinent part:

§ 891. Definitions and rules of construction

For the purposes of this chapter:

> (1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express,

whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

• • •

Title 18, Section 892, United States Code, provides:

§ 892. Making extortionate extensions of credit

(a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is a prima facie evidence that the extension of credit was extortionate, but this subsection is non-exclusive and in no way limits the effect or applicability of subsection (a):

(1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor

(A) in the jurisdiction within which the debtor, if a natural person, resided or

(B) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business

at the time the extension of credit was made.

(2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(3) At the time the extension of credit was made, the debtor reasonably believed that either

(A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the

nonrepayment thereof had been punished by extortionate means; or

(B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

(4) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection (b) (1) or (b) (2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

STATEMENT

Petitioners were indicted by the June Grand Jury of the Northern District of Illinois in a one-count indictment charging a conspiracy, beginning April, 1966, and continuing to the date of the return of the indictment (November 3, 1969), to make extortionate extensions of credit in violation of Section 892, Title 18, United States Code. Following a jury trial, the defendants were all adjudged guilty. Sentences ranged from 15 years' imprisonment and a $10,000 fine for Petitioner Annoreno to 3 years' imprisonment for co-defendants Pullia and Reno. Upon appeal of all defendants but Pullia, the conviction of Anthony Reno was reversed and all other convictions were affirmed (App. A, *infra*).

1. Failure of proof, admission of prejudicial and irrelevant evidence, and refusal to order a bill of particulars regarding facts essential to preparation of an adequate and intelligent defense, based upon a misconstruction of the Statute and the indictment.

The indictment charged that the defendants "unlawfully, willfully and knowingly" conspired to make and cause to be made "extortionate extensions of credit".[1]

Each of the several defendants below filed a pre-trial motion to dismiss the indictment. These several motions are treated herein as having been collectively filed for all of the defendants.

The motions alleged generally that the indictment should have been dismissed because it failed to inform the defendants of the nature and cause of the accusation with the certainty required by law. (See e.g., De Riggi Motion, R. 13, para 1) Therefore, it was claimed, it was impossible for the defendants to prepare a defense. (See, e.g., Milstein Motion, R. 33, para. 3)

Further, the motions challenged the indictment as attempting to charge an offense which, according to the indictment, commenced prior to the effective date of the statute creating the offense. (See, e.g., De Riggi Motion, R. 13, para. 6)

The defendants also filed motions for a Bill of Particulars requesting, *inter alia*, that the Government be ordered to file

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[1] "Extortionate extensions of credit" are defined in Section 891 (6), Title 18, United States Code: "An extortionate extension of credit is any extension of credit with respect to which it is the understanding of creditor and debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person."

a bill setting forth the names of all debtors whom the Government intended to call as witnesses to establish debts or a debtor relationship with the defendants; and the names of those persons to whom the word "juice" was mentioned (as alleged in paragraph 4 of the indictment) in order to instill fear that failure to repay a loan would result in violence. (See, e.g., Milstein Motion, R. 37, paras. 1 and 2) These motions were also denied by the District Judge. (R. 58, p. 11)

In affirming the action of the District Judge, the Court of Appeals held:

> "[Petitioners'] argument is predicated upon the First Circuit's holding in *United States* v. *Tomasetta*, 429 F.2d 978 (1st Cir. 1970). That case, while at first glance apposite to the situation before us, is distinguishable. *Tomasetta* involved an attack upon an indictment for the substantive offense of extortionate loan sharking. There, the First Circuit reversed a conviction because the indictment had failed to provide an adequate description of the act charged.
>
> "In the instant case, however, the indictment does not charge the substantive offense but rather a conspiracy to make extortionate extensions of credit. The difference is significant with respect to defendants' argument that the refusal of their request for a bill of particulars prevented them from adequately preparing their defense. They charge that without knowledge of the specific parties to whom they allegedly made loans, they were unable to 'explain and demonstrate the lack of substance of the expressed fear of those who borrowed money' or 'establish a lack of fear by the borrowers at the times in question.' These issues, however relevant to an indictment for the substantive offenses, are not defenses to the conspiracy charge against the defendants. On the contrary, the essence of this indictment was the intent to create an

atmosphere of intimidation and fear with respect to the loans made, not the actual accomplishment of that intent in particular instances.

"While we cannot deny that the production of the information requested might have facilitated the preparation of the defense, we do not believe that this information was so essential to that defense as to warrant the circumvention of the well established rule that the government is not required to disclose the identity of its witnesses. * * * " (App. A, 12-13, *infra).*

The government's proof consisted, in part, of testimony by twenty-six witnesses who testified that they had on one or more occasions borrowed money from certain of the petitioners. This testimony was designed to show that the petitioners were joint participants in the business of lending money at high rates of interest.[2] This evidence further showed that the loans were generally made upon one of 2 conditions: the borrower would pay a specified rate of interest each week until such time as the principal was repaid in a lump sum; or the borrower would repay a specified sum each week for a specified time, usually ten weeks, until the total principal and interest was repaid. Under the former plan, the interest rates ranged from 5 to 10 per cent per week; under the latter, interest ranged from 50 to 100 per cent.

Different methods of proving fear of reprisal as a consequence of non-payment of principal or interest were taken. These methods may be described, generally, as follows:

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[2] In addition, the government produced F.B.I. agents who had witnessed and photographed various borrowers and petitioners meeting at different times.

Of the twenty-six debtor-witnesses, seven failed to give any testimony of an understanding or belief that reprisals would result from non-payment.[3]

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[3] Harry Shearn testified to having borrowed money from Annoreno and having made payments to Annoreno, Vito Spillone, Vertucci and Tony Reno from the beginning of 1966 until the beginning of 1970. On occasion, he was late in making his payments. Nevertheless, he did not testify to any threats by, or subjective fears of, the defendants. He even brought Annoreno presents because Annoreno was nice to him. (Tr. 1501-30)

Ronald Vales' initial loan was from strangers to this case. Milstein assumed this loan in February or March, 1967. Vales said nothing about his state of mind, either at the time he initially borrowed the money, or at the time Milstein was introduced to him as the person who was taking the loan over. Milstein, when Vales was late in making his payments, did say he would have to turn Vales' name in if he did not keep up with his payments, but, although Vales continued to be late in making payments, Milstein never threatened or abused him, or gave him any trouble. In fact, Milstein once explained to Vales that he had paid off Vales' loan because he did not want Vales to get in trouble with the (unidentified) man who had originally loaned him the money. In any event, there were no expressions of fear by Vales to anything said or done by any of his creditors. (Tr. 902-19)

Mary Vinzant did not articulate a subjective fear of violence or other criminal pressures. She borrowed money from Bucaro twice. She said nothing about her state of mind at the time she made her first loan. With reference to the second, she said: "I knew I had to pay it back when I got it, that it was the best thing for me to do if I was going to borrow, it had to be paid back." (Tr. 1189) Moreover, Mrs. Vinzant was not subjected to any threats, despite her having missed one or two weekly payments. (Tr. 1191)

The testimony given by Clifford Copeland was much to the same effect. Copeland said that at the time he borrowed money from Annoreno in Mid-April, 1968, he "guessed they'd come looking for me, that's all," should he fail to repay the money he borrowed. (Tr. 880) He was, however, never threatened in connection with this loan, even though his payments were irregular and as much as eight weeks late. (Tr. 878-88)

Thomas Inman was told by Bucaro, when he borrowed money from him in August, 1969, that he had to pay the money back.

Thirteen witnesses based their testimony of fear of reprisal on their own subjective attitudes, claiming, in substance, they understood, at the time they received their loans, that if repayment were not made they might be injured. With one exception discussed below these wit-

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(footnote continued)

That was all that Bucaro said. From this, Inman gained the understanding that Bucaro would "be looking for me if I didn't pay him." (Tr. 1175)

Joseph Del Giorno said nothing about expecting violence or harm if he did not repay the money he borrowed from Annoreno in October, 1967. When he apparently felt he had paid enough on this loan, he stopped making payments and voluntarily called Annoreno. Later, he met Annoreno and a heated argument and fight ensued. Del Giorno, as a result, made two more payments, leaving him $50 short of fulfilling his agreement. At no point did Del Giorno express his state of mind at the time of making the loan. (Tr. 951-61)

This situation was repeated in the case of James Allsenberrie, himself a lender of money at usurious rates of interest. (Tr. 1348) In August, 1967, when he sought a $600 loan from Annoreno, he owed approximately $1,500 in principal and interest on two 1966 loans he had received from Kobylarz. Despite these arrearages, he said nothing about having been threatened by anybody, or about his own state of mind regarding his situation. On the way to meet Annoreno, Kobylarz said this was "outfit" money and Allensberrie would have to repay it. (Tr. 1334) Still Allsenberrie said nothing about his state of mind at the time. When he met with Annoreno, who asked him why he had not been making his payment, Allsenberrie was not threatened. Instead, Annoreno listened to the reasons why Allsenberrie had fallen into arrears, declined to loan him additional money because he was not in a position to pay the money he owed, and extended him six weeks to "straighten out his affairs" and start making payments. (Tr. 1334-9)

In September, 1967, Allsenberrie, armed with a pistol, went to meet Annoreno. Again he explained why he had not been able to make payments. This time Annoreno, according to Allsenberrie,

nesses did not base their testimony in this regard on any prior or concurrent action or statement by the persons who loaned them money.[4]

(footnote continued)

made veiled threats against his wife and family. Nevertheless, without argument, Annoreno reduced the amount Allsenberrie was to pay from $1,700 to $600, dispensed with interest and allowed Allsenberrie to pay at the rate of $30 a week, and extended Allsenberrie six weeks grace before the payments were to begin. Far from being threatened by this meeting, Allsenberrie went to Kobylarz to tell him he had seen Annoreno and that everything was all right. (Tr. 1343-5) Allsenberrie never made any further payments on these loans. (Tr. 1345) Yet, he did not testify to any threats, or to any fears on his part.

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[4] In the interest of accuracy, and not because the statute permits proof of subsequent beliefs or understandings, we submit the following further breakdown of these witnesses' transactions: Lardino testified that he suffered a beating from a companion of Vito Spillone in April, 1967, after Lardino had received his last loan. Spillone stopped the fight and, possibly, hit the man who had beaten Lardino. (Tr. 1014-6, 1021) Kodish said he was threatened by Spillone, directly, and Annoreno, indirectly, after he missed ten payments on his first loan. (Tr. 799, 802) After this, Kodish's payments were reduced, and Kodish thereafter made another loan. He said he feared reprisals as a consequence of non-payment when he made this loan. (Tr. 803-9) Goldberg said he had never been threatened by Milstein, but that Milstein did tell him, after he had missed several payments, that Milstein would have to turn his name in if he did not make up the payments. (Tr. 928-31, 944-5) Gallos said he was eventually threatened by Bucaro after missing several payments. (Tr. 703-7) On the other hand, Casey (Tr. 1291-3), Lucarelli (Tr. 1423-4, 1431-2, 1437, 1442, 1445), Annarino (Tr. 311-2, 323), Gammino (Tr. 239), Balice (Tr. 659, 665), and Rafalson (Tr. 692-3) all affirmed they were never threatened. Glienke and Fridel said nothing about any threats having been made at any time. Woodward said nothing about a threat to him, but identified a statement which could or could not have been considered a threat against another man which he was supposed to convey. (Tr. 385-91)

Six witnesses testified to what may be considered a prior factual basis for an understanding of fear of reprisal for non-payment.[5] Of these, only four related to loans made subsequent to May 29, 1968—the effective date of the statute.[6]

In rejecting Petitioners' contention that the sufficiency of the evidence should be tested by these incidents alone, the Court of Appeals held (App. A, 9-11, *infra*):

> The defendants argue that this court, in reviewing sufficiency of the evidence, should look only at transactions occurring after May, 1968. In light of the analysis in part I, we have rejected their contention and have reviewed all the evidence introduced at trial.
>
> * * *
>
> The defendants, acknowledging that loans were made and that the interest rates on those loans were excessive, argue that the government failed to prove that the loans were extortionate in nature. This contention is based on the defendants' belief that the "understanding" required by section 891(6) of the statute must be express rather than implicit. They further contend that the "subjective belief" of a borrower that failure to repay the loan would be dealt with violently is insufficient to establish extortion unless that belief has a "factual basis" in the evidence.
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> * * *

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[5] Koodish (second loan—see note 4, *supra*); Olson; Barnes; Sipples; Berbiar; and Madsen. In addition, a loan was made to Larry Bearden in mid-1968, the circumstances of which may be said to qualify under § 892(b). This was the only instance in which a debtor-witness claimed knowledge that the creditor had previously employed extortionate means. No witness testified to "reputation" as permitted by § 892(b)(3)(B).

[6] Koodish (second loan); Barnes (a third loan); Sipples; Madsen.

> We believe that this argument is based on an erroneous premise. The term "understanding" as used in this statute should not, as defendants argue, be interpreted as requiring an agreement. Rather, it should be given its primary meaning of comprehension. Clearly, Congress could not have intended to punish only those loan sharks foolish enough to make the terms of the loan explicit and to exempt those who convey the nature of the transaction by subtle hints and innuendo. Where the threat of violence exists and is comprehended by the victim, the extortionate nature of the transaction is present and punishable under this statute.
>
> Thus, the inquiry into whether the borrowers had a factual basis for their comprehension of the consequences of default need not be restricted to a search of the record for explicit threats. On the contrary, the inquiry should be whether the record as a whole discloses a reasonable basis upon which the borrowers might have predicated their fear that default or delinquency might result in harm to themselves or their families. * * *

2. Admission of prejudicial evidence of Petitioners' pre-statutory activities and failure to give adequate and proper limiting instructions concerning such evidence.

Twenty of the twenty-six debtor witnesses testified to having borrowed money prior to the effective date of the statute. Of these twenty, nine described having made repayments on prior loans subsequent to May 29, 1968. Eight other witnesses from this group of twenty borrowed further sums of money subsequent to May 29th. With respect to the role of pre-May 29, 1968, evidence of loans the trial judge instructed the jury at the conclusion of the case:

> "To convict any of the defendants of the charge in the indictment the Government must prove beyond a reasonable doubt:

"(1) That a conspiracy existed to make extortionate extensions of credit in violation of Section 892 of Title 18, United States Code;

"(2) That this alleged conspiracy was in existence after May 29, 1968. If you find that the alleged conspiracy was in existence after May 29, 1968, then you may consider as evidence of that alleged conspiracy acts, conversations, and declarations, made before May 29, 1968, which were in furtherance of that alleged conspiracy; and that

"(3) During the existence of the conspiracy, and after May 29, 1968, at least one overt act as set forth in the indictment was committed by one or more members of the conspiracy in furtherance of the objectives of the conspiracy." (Tr. 2400)

"To convict any particular defendant of the conspiracy charged in the indictment, the Government must prove beyond a reasonable doubt that

"(1) A conspiracy existed to make extortionate extensions of credit in violation of Section 892 of Title 18, United States Code;

"(2) This conspiracy was in existence after May 29, 1968;

"(3) The particular defendant was knowingly and willfully a member of this conspiracy and that he was aware of the common purpose and was a willing participant with the intent to advance the purpose of the conspiracy; and that

"(4) During the existence of this conspiracy, and after May 29, 1968, at least one overt act as set forth in the indictment was committed by one or more members of the conspiracy in furtherance of the objectives of the alleged conspiracy.

"For you to find a particular defendant guilty of conspiracy you need not find that he personally par-

> ticipated in an overt act so long as evidence of his own conduct has proved beyond a reasonable doubt his participation in the alleged conspiracy, and one of the overt acts was performed by a co-conspirator in behalf of all after May 2, 1968." (Tr. 2401-2)
>
> * * *

Responding to the Petitioners' claim that the jury was not adequately instructed concerning the purpose for which the pre-May 29th evidence of loans was introduced, the Court of Appeals held:

> The admission of such evidence, it is true, should be followed by a limiting instruction informing the jury of the purpose for which it can consider the proof. However, we cannot accede to defendants' view that such limiting instructions were ineffective in this case simply because they were not given contemporaneously with the admission of the evidence. An adequate charge was given prior to the jury's retirement and we believe that instruction clearly set forth the limits within which the evidence could be used. (App. A, 8, *infra*).

3. Failure to grant proper and adequate hearing into question of investigative taint emanating from illegal electronic eavesdropping of Petitioners Annoreno, De Riggi and Milstein.

The Government admitted to illegal eavesdropping of conversations involving Annoreno, DeRiggi, and Milstein, as well as others, concerning "juice" operations and membership of what was called the "Buccieri Organization," from May 8, 1963, to June 17, 1963, and from October 24, 1963, to May 24, 1963. The eavesdropping was done at the direction of the Washington office of the FBI with the approval of the Attorney General. (H.Tr. 159) Affidavits filed by the Government disclaimed using information derived from these sources in the trial or investigation of the case.

FBI Agent Wolf planned and assisted in the installation of the wiretap and was the only agent authorized to listen to and transcribe the recordings made. Wolf summarized these logs weekly in "Airtels" which he sent to FBI Headquarters in Washington at their request (H.Tr. 213-4) and to the U.S. Attorney's office in Chicago.

On the ground that there were no conversations reported in these Airtels which were not contained in the logs turned over to the defendants, the district Judge denied a motion to require production of the Airtels. (H.Tr. 184-6, 210) The district judge also refused to allow the defendants to ascertain the name of the agent to whom they were sent and the purpose of their being sent even though defense counsel explained that their objective was to determine whether any leads obtained from the information in the Airtels were followed up in Washington. (H.Tr. 214-17, 434-5).

Also, six reports concerning individuals other than the defendants in which information from two electronic surveillance was incorporated, one of which mentioned Annoreno in connection with a juice operation, were submitted by Wolf to the U. S. Attorney's office in Chicago, sent to the Organized Crime Section in Washington, and maintained in the Chicago F.B.I. office. (H.Tr. 593-4, 604) The district judge denied access to these reports and an alternative defense motion that these reports be made part of the record. (H.Tr. 606, 763-4)

On instructions from F.B.I. headquarters in Washington, because information had been received from live sources indicating Annoreno's position in organized crime, a "case" was opened against him in October, 1965. (H.Tr. 439, 441) The order came from the same division to which the Airtels had been sent. (H.Tr. 442) The F.B.I. agent assigned to the case read the tainted Wolf report con-

cerning Annoreno's juice activities with the Buccieri Organization. (H.Tr. 670-1) Reports were made every 3 or 4 months concerning the Annoreno investigation by the C-1 Squad. These reports were sent to the U.S. Attorney's Office and to the Bureau in Washington. The defense was denied access to these reports. (H. Tr. 678-80)

Assistant U.S. Attorney Adelstein had read the Airtels while he was assigned in Washington (H.Tr. 621-2) and he continued to read whatever was sent to the U.S. Attorney's office after his transfer to Chicago. (H.Tr. 622) He was a causal factor behind an allegedly independent investigation of Annoreno commenced by the IRS. (H.Tr. 646, 733, 754)

On March 7, 1968, I.R.S. intelligence agents called on Annoreno at his home for purposes of conducting an interview regarding Annoreno's income tax liabilities for the years 1963-66. One of the agents had received information from Adelstein that Annoreno was involved in a juice operation. (H.Tr. 379-82, 643, 645, 650) I.R.S. group supervisor John J. McDermott said that the orders to conduct the investigation of Annoreno originated in October, 1967, from the Chicago office (H.Tr. 732), but he did not know the source of the information. (H.Tr. 733, 754)

In July, 1967, I.R.S. agent George Stern had a conversation with FBI agent Dallman concerning Albert Milstein. Stern had been assigned an income tax investigation of Milstein and apropos of that, the two discussed his general background, business and real estate and other matters pertaining to his income taxes. Although the investigation entailed Milstein's juice operations, Stern said that "no significant information" was obtained from the FBI. (H.

Tr. 535) The defense was denied access to Stern's memorandum of the conversation with Dallman. (H.Tr. 547-8)

Stern consulted a report, "Crime Conditions in The Chicago Area", written by the FBI agent William Roemer, a member of the C-1 Squad who had spoken with Wolf but who had received no oral information from him. Wolf's six reports were readily available to Roemer. (H.Tr. 777-9, 793) Roemer denied that he had ever read the six reports. (H.Tr. 793) The reports were sent only to the FBI in Washington. No copies were sent to the I.R.S. from the Chicago office of the FBI.

A defense request for the reports which Roemer used in preparing his report was denied. (H.Tr. 782-4) The trial judge also denied a defense request to make these reports part of the record on appeal. (H.Tr. 785)

Sometime between January, 1967, and May, 1968, Stern's office requested information from the FBI regarding their file on Milstein. (H.Tr. 557) Pursuant to the request, Stern received three FBI reports and, although Stern said that none of the reports dealt with Milstein's lending of money, the aforementioned FBI report entitled "Crime Conditions in the Chicago Area," dated March, 1965, did mention that Milstein was involved in lending money. This report was read by Stern between January, 1967, and May 1968. (H.Tr. 575-6) A defense request for these reports and notes was also denied (H.Tr. 560-3)

Stern began surveillance of the Family Amusement Center, where the bulk of incriminating evidence against the defendants was gathered, on May 1, 1968. Stern said that the first information he had regarding Annoreno's conducting an alleged juice operation at the Amusement Center was after he began the surveillance.

On June 19, 1968, Stern told FBI agent John Dallman about the I.R.S. surveillance of the Family Amusement

Center (H.Tr. 504) At the time, Dallman was investigating Milstein and DiRiggi. The FBI surveillance of the Amusement Center, from which this case arose ensued.

4. Failure to grant hearing on Milstein's Motion to Suppress Evidence.

The Defendant Milstein moved to quash a certain search warrant, issued and executed in August, 1968, and to suppress certain evidence seized from his person and premises after execution of the search warrant. (R. 104) In his verified motion, Milstein set forth that the warrant, which was made a part of the motion, called for the seizure of certain cartons of battery charges and authorized a search of the basement of his restaurant at 5034 W. Madison, Chicago, Illinois, for these cartons. Milstein further alleged that the executing officers searched other parts of these premises and another address; from Milstein's person, the officers seized a small address book, and from a refrigerator they recovered a larger book; neither book was described or mentioned in the warrant. Milstein also claimed that the warrant was based on hearsay, the reliability of which had not been established.

Finally, he set forth his understanding that the United States, in the trial of this case, intended to call witnesses against him whose identities had been learned as a result of the seizure of these books. He requested a hearing to resolve these allegations, and prayed that the books and all evidence obtained therefrom be suppressed. (R. 104)

Ordered to file a memorandum in response to this Motion (R. 105), the Government conceded that a "green book" was discovered atop a milk dispenser as a result of a "cursory" search of the restaurant proper after the cartons of battery chargers for which the warrant had issued had been found. The Government represented that it would not seek to introduce this "green book" into evi-

dence in the trial of this case, nor had it interviewed or subpoenaed for trial any persons whose name appeared "only" in this book. (R. 110, pp. 1-2)

Affidavits of some of the agents who participated in this search, seizure and arrest were attached to the Government's memorandum. Agent Cavanagh's affidavit recited that he and five other F.B.I. Agents entered Milstein's restaurant to serve and execute the warrant. After Milstein was served with the warrant a search of the basements and the areas immediately leading to the basements was conducted. While the search was taking place Milstein walked back into his office. Cavanagh followed him there. Milstein then "wandered" between the office, the restaurant and a shed in back. Milstein was placed under arrest immediately following the discovery of the battery chargers in the shed behind the restaurant. This arrest took place in Milstein's office. After Milstein's arrest he was taken to the restaurant portion of the premises where he sat at a table approximately ten feet from the cash register and the steam table. While Milstein sat at the table, Cavanagh searched the area around the cash register and the milk dispenser, which was adjacent. Cavanagh looked inside the register and found, among other items, "betting records and slips and copies of the Illinois Sporting News—race forms." Then he searched inside and underneath the milk dispenser, finding "additional betting records" under the dispenser. He then reached up and ran his hand along the top of the dispenser, and felt a hard object. He "removed this object which was a green address book and quickly glanced through it, looking for evidence pertaining to the stolen chargers, i.e., payment records, orders, receipts, etc., and further gambling records." Apparently he found none for while he was "placing this book back on the counter along side the milk dispenser, [he] noticed some penciled notations on the second

to last page. These notations were immediately apparent to [him] to be 'juice' records and [he] therefore seized this green address book." Cavanagh had, according to his affidavit, knowledge that Milstein had engaged in juice loans since 1963.

Agent Dolan's affidavit recited, *inter alia,* that later, Milstein was transported to F.B.I. headquarters, where agents Donnelly and Dolan conducted a "routine search" of Milstein's person. The two agents seized the brown address book and other items disclosed by this search. (R. 110)

It was not until late January, 1969, that Cavanagh compared data contained in the green book with data contained in the brown book which had been seized from Milstein's person. Based on the data in both books Cavanagh opened approximately thirty cases against Milstein.

A joint affidavit executed by Agents Cavanagh and Wolf revealed that cases opened at that time as a result of the study of these two books involved Seymour Berbiar and Ronald Vales who were Government witnesses at trial.

The seizure of the battery chargers pursuant to the warrant was upheld by another District Judge during Milstein's trial for illegally possessing those items.

Milstein's motion to suppress evidence was denied without a hearing. (R. 106)

Evidence heard at trial and at the post-trial hearing into the effect of the Government's illegal eavesdropping revealed that, of the three trial witnesses who testified to having borrowed money from, or paid money to, Milstein, two were uncovered through the use of these books. During trial, the brown book was shown to Vales and Goldberg who identified their names, addresses and telephone numbers therein (Tr. 914, 936-7), and was introduced into evidence. (G. Ex. 936)

REASONS FOR GRANTING THE WRIT

1. Failure of proof, admission of prejudicial and irrelevant evidence, and refusal to order a bill of particulars regarding facts essential to preparation of an adequate and intelligent defense, based upon a misconstruction of the Statute and the indictment.

The indictment in this case charged, in relatively uncomplicated language, that these Petitioners conspired to make "extortionate extensions of credit" and to cause such loans to be made.

Section 892, Title 18, United States Code—the object-violation of the alleged conspiracy—describes those elements of an "extension of credit" which make it "extortionate." (18 U.S.C. §893(b)) The Statute also allows proof by an alternate method, however, and that method relies on the description provided in Section 891 (6). With one exception, not pertinent here, the Government's proof in the present case was designed to meet the test described in Section 891 (6):

> "An extortionate of credit is an extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence * * *"

And as outlined above, the evidence in this case showed that extortionary language was not directed to all of the borrowers who testified to subjective fears. Moreover, in many cases where extortionary language was used, it was used at a time when the borrowers fell behind in their payments rather than at the time the

loans were made. Finally, several other witnesses testified to borrowing money at usurious rates of interest, but did not express any fears at any time.

Despite the apparently plain language of Section 891 (6), the Court of Appeals rejected Petitioners' arguments that it was improper and prejudicial to allow the Government to proceed and to prove its case in this manner. This rejection was based on an interpretation of the Statute and the charge which merits review by this Court.

The ultimate expression of the construction given the charge by the Court of Appeals appears in connection with the Court's decision that the Petitioners were not entitled to a bill of particulars identifying the persons to whom they were alleged to have made extortionate extensions of credit.

Petitioners had claimed in the court below that, as the crime with which they were charged was essentially a speaking offense—that is, one in which they were accused of conveying a threat of extortion by word or by deed—it was necessary in order to preserve their constitutional right to present an adequate and intelligent defense that they be advised of the identities of those persons who were the alleged victims of their activities. They argued that disclosure of the names of these borrowers would have provided three potential avenues for pre-trial preparation. First, the Petitioners' memories as to exactly what was said to each of these borrowers could have been searched at a time nearer the incident in question and free from the pressures of mid-trial attempts at recollection. Second, statements from these borrowers seeking full exposition of the factual bases for their subjective beliefs could have been obtained. And third, witnesses to the incidents could have been interviewed and, if their recollections were favorable, sub-

poenaed to establish a lack of fear by the borrowers at the times in question. See *United States* v. *Tomasetta,* 1st Cir. 1970 429 F.2d 978, 979-80; *Cf. Will* v. *United States,* 389 U.S. 90, 99 (1967).

This essentially was the attitude taken by the United States Court of Appeals for the First Circuit in *United States* v. *Tomasetta,* 1st Cir. 1970, 429 F.2d 978. The indictment in that case charged a violation of Section 894 in that the defendant allegedly participated "in the use of extortionate means * * * namely, an express and implicit threat of use of violence to cause harm to the person of *certain persons,* to collect and attempt to collect extensions of credit * * * *" Acting on the defendant's motion to dismiss this indictment because of the failure to name the person or persons who were threatened (and other reasons), the court recognized the almost insurmountable barriers placed in the path of a defendant's preparing an intelligent defense in cases such as these where the indictment fails to advise him of the name of the person threatened. Contrasting the immediate situation with that in which a defendant is accused of transfering narcotics in violation of 26 U.S.C. 4705 (a), the Court observed:

> "* * * the allegation of a sale transaction [in which the name of the purchaser need not be alleged in the indictment, see Sanchez v. United States, 1st Cir. 1965, 341 F.2d 379; compare Lauer v. United States, 7th Cir. 1963, 320 F.2d 187, with Collins v. Markley, 7th Cir. 1965, 346 F.2d 230] is to be contrasted in its concreteness of reference to unspecified words, looks, and gestures, choate or inchoate, which could have been interpreted by anyone within sound or sight of Tomasetta as threats of violense. Such differences are enough to place the present indictment beyond the pale. * * *" 429 F.2d at 981.

The Court of Appeals realized the merit underlying the argument and the force of the opinion in *Tomasetta*. Each was distinguished, however, in a manner which gives new meaning to the Statute and the indictment:

> "In the instant case, however, the indictment does not charge the substantive offense but rather a conspiracy to make extortionate extensions of credit. The difference is significant with respect to defendants' argument that the refusal of their request for a bill of particulars prevented them from adequately preparing their defense. They charge that without knowledge of the specific parties to whom they allegedly made loans, they were unable to 'explain and demonstrate the lack of substance of the expressed fear of those who borrowed money' or 'establish a lack of fear by the borrowers at the times in question.' These issues, however relevant to an indictment for the substantive offenses, are not defenses to the conspiracy charge against the defendants. On the contrary, the essence of this indictment was the intent to create an atmosphere of intimidation and fear with respect to the loans made, not the actual accomplishment of that intent in particular instances." (App. A, 12-13, *infra.*)

A variant of this interpretation of the Statute enabled the Court of Appeals to reject Petitioners' arguments that the debtor-testimony described above did not support the charge and was prejudicially irrelevant. To Petitioners' claim that proof of the offense charged could only be supported by evidence of a fear of reprisal prompted by some word or deed of the Petitioners and existing at the time the loan was made, the Court held:

> "We believe that this argument is based on an erroneous premise. The term 'understanding' as used in this statute should not, as defendants argue, be interpreted as requiring an agreement. Rather, it should be given its primary meaning of comprehen-

sion.[6] Clearly, Congress could not have intended to punish only those loan sharks foolish enough to make the terms of the loan explicit and to exempt those who convey the nature of the transaction by subtle hints and innuendo. Where the threat of violence exists and is comprehended by the victim, the extortionate nature of the transaction is present and punishable under this statute.

Thus, the inquiry into whether the borrowers had a factual basis for their comprehension of the consequences of default need not be restricted to a search of the record for explicit threats.[7] On the contrary

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[6] Webster's Third New International Dictionary of the English Language, Unabridged (1961), at 2490, gives, as the primary meaning of the word, "[t]he Act of grasping mentally: comprehension, discernment, interpretation." An alternate meaning of "[a] mutual agreement not formally entered into but in some degree binding on each side" is given as definition number 4c. The Random House Dictionary of the English Language (1966) states the primary meaning of the word to be "mental process of one who comprehends; comprehension; personal interpretation." An alternate meaning of "a mutual agreement, especially of a private, unannounced, or tacit kind" is given as the sixth definition.

[7] Contrary to defendants' contention, it is of no significance that express extortionary language was not directed to all the borrowers or that some of the borrowers were first threatened when they became delinquent in their repayments rather than when they initially obtained their loans. The defendants were charged with conspiring to make credit extensions which were intended to be extortionate, not with the substantive violations. Therefore, the actual understanding of specific borrowers was not an element of the conspiracy with which defendants were charged. The government need only have proved that the defendants planned and intended that those to whom they extended credit would understand the possible harmful consequences of default or delinquency. • • •

> the inquiry should be whether the record as a whole discloses a reasonable basis upon which the borrowers might have predicated their fear that default or delinquency might result in harm to themselves or their families. * * *

This position, we submit, should be re-examined by this Court. The conclusion, evidenced by the manner in which the Court of Appeals disposed of Petitioners' bill-of-particulars claim, holds the potential for permitting federal prosecution of peculiarly state offenses by he simple expedient of charging a conspiracy rather than the substantive offense. In *Perez* v. *United States,* 402 U.S. 146 (1971), this Court upheld the validity of Title II of the Consumer Credit Protection Act (18 U.S.C. §§ 891 et seq.) against the claim that it represented an impermissible exercise by Congress of its powers under the Commerce Clause. But in so doing, the Court recognized, *inter alia,* the national affect of "loan sharking," including the affect of its extortionate features. (402 U.S. at 156.) *Cf. United States* v. *Palmieri,* 2nd Cir. 1972, 456 F.2d 9, 12.

If the extortionate features of Section 892 may be eliminated by the device of charging a conspiracy rather than a substantive violation, the original meaning of the Statute, as well as the Indictment purporting to charge a conspiracy to violate the Statute, is changed drastically. Compare, *Stirone* v. *United States,* 361 U.S. 212 (1960).

Similarly, if the "understanding of the creditor and the debtor at the time" the loan is made may be construed to mean "a comprehension [of the debtor] of the consequences of default" supportable by the "record as a whole" (App. A, 11, *infra*), then Section 891 has lost the meaning it was intended to have. This case illustrates that loss, for the opinion of the Court of Appeals literal-

ly permits a debtor's subjective "comprehension" to form the basis of a conviction, even though the only support for that comprehension is the experience of a different borrower unknown to the particular borrower in question, and even though that experience occurred prior to the effective date of the statute. (App. A, 9-11, *infra.*)

In brief, the opinion of the Court of Appeals permitted and will permit prosecutions for conspiracy to make *usurious* extensions of credit under circumstances in which some of the borrowers later expressed a fear that violent methods would be used to collect these loans. The indictment did not describe such an offense, nor does the Statute prohibit such conduct. For this reason we urge the Court to examine this case.

Finally, the attempted avoidance of conflict with the First Circuit's holding in *Tomasetta* also merits review by this Court. The view taken by the Court of Appeals in the present case, based on its opinion of what is permissible by way of proof and notice to the defense when a conspiracy is charged, in contrast to when a substantive offense is charged, substantially "broaden[s] the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States,* 353 U.S. 391, 404. Petitioners here went to trial totally unprepared as to the extent, nature and source of the claims that would be urged against them. Because they were charged with conspiracy, they suffered vagaries that would not have been permitted had they been charged with the substantive offense they were accused of conspiring to commit. This Court, in addition to reasons already urged, should grant certiorari to decide whether the Fifth Amendment guaranty of due process permits the conspiracy statute to accomplish this.

2. Admission of prejudicial evidence of Petitioners' pre-statutory activities and failure to give adequate and proper limiting instructions concerning such evidence.

A further facet of this case, to which we have referred above, is also deserving of examination by the Court. The indictment charged a conspiracy to make extortionate extensions of credit beginning in April, 1966. The Statute prohibiting the substantive offense became effective May 29, 1968. Thus the Petitioners were literally charged with a violation of law commencing almost two years before their alleged conduct was made criminal by statute.

The opinion of the Court of Appeals holds, in effect, that they were not prosecuted for this phase of their conduct because the trial judge instructed the jury that a guilty verdict could be based only on conduct occurring after May 29, 1968. (App. A, 7-8, *infra.*) The Court acknowledged the necessity of giving limiting instructions informing the jury of the purpose for which it could consider pre-criminal activities (App. A, 8, *infra*), but felt that the single instruction given by the trial judge at the conclusion of the evidence was sufficient.

The danger in this practice is that, unless the jury is instructed at the time of the receipt of evidence such as this (compare, *United States* v. *Phillips,* 7th Cir. 1955, 217 F.2d 435; *Gross* v. *United States,* 8th Cir. 1968, 394 F.2d 216; *United States* v. *Kennedy,* 2nd Cir. 1961, 291 F.2d 457, 458; *Sagansky* v. *United States,* 1st Cir. 1966, 358 F. 2d 195; *Semler* v. *United States,* 9th Cir. 1964, 332 F.2d 6), a grave possibility exists that it will lose sight of exactly what evidence is to be considered in the limited manner. Here, as the Court of Appeals pointed out, the evidence showed that most pre-May 29th borrowers continued their

relationships with the Petitioners beyond May 29th. But the relationships differed. Of the twenty pre-May 29th borrowers, eight testified to having borrowed subsequent to May 29th. But nine of the witnesses who testified to pre-May 29th loans did not borrow money after the effective date of the Statute. They did, however, continue to make payment on their prior loans. It was crucial to the Petitioners' rights to a fair trial that the jury be constantly advised of the role of these two types of evidence.

It is difficult enough, in trials involving many defendants and a great number of transactions, for the jury to give separate consideration to each defendant. *Cf. Kotteakos* v. *United States,* 328 U.S. 750; *Krulewitch* v. *United States,* 336 U.S. 440, 445 (concurring opinion). Here the jury was required to give separate consideration not only to the defendants but to evidence which, although similar, had different application. This Court, in the exercise of its supervisory powers over the lower federal courts, should grant certiorari to establish realistic and workable guidelines for such trials.

3. Failure to grant proper and adequate hearing into question of investigative taint emanating from illegal electronic eavesdropping of Petitioners Annoreno, De Riggi and Milstein.

On the present state of the record there is no claim that evidence presented during the trial of this cause was directly obtained from the illegal surveillance of Annoreno, De Riggi and Milstein. The most that can be said in this respect is that a witness and an informant who directed the FBI to another eventual witness were mentioned in the logs. (H.Tr. 235-8; 391-3; 602) However, Agent Wolf claimed the witness was developed by an independent informant. Petitioners were not permitted discov-

ery as to the names of either the informant who developed the witness or the informant mentioned in the logs. Whether witnesses discovered by means of an unconstitutional search may be "suppressed" has never before been decided by the Court, despite lower court decisions on both sides of the issue. Compare, *Smith* v. *United States,* D.C.Cir. 1965, 344 F.2d 545; *United States* v. *Tane,* 2nd Cir. 1964, 329 F.2d 848; *Williams* v. *United States,* 5th Cir. 1967, 382 F.2d 48; *United States* v. *Schipani,* E.D.N.Y. 1968, 289 F.Supp. 43, with, *Smith* v. *United States,* D.C. Cir 1963, 324 F.2d 879; *United States* v. *Hoffman,* 7th Cir. 1967, 385 F.2d 501. Certiorari would be warranted for the purpose of resolving this issue alone.

But the action of the trial judge in refusing to allow Petitioners to discover the identities of the informants is a micro organism of the larger issue generated by the manner in which the hearing was conducted. Petitioners were also entitled to determine whether the entire investigation against them was tainted because it was intensified by the electronic surveillance. If illegally obtained information spurs the Government substantially to intensify an investigation, all evidence subsequently discovered may be said to have been come by as a result of the Government's exploitation of its own illegal conduct. See *Wong Sun* v. *United States,* 371 U.S. 471, 488 (1963); *United States* v. *Schipani,* E.D.N.Y. 1968, 289 F.Supp. 43, 62. It is not, as the district judge here seemed to feel, only evidence which comes to light as a direct result of the illegal conduct which is tainted. The proper test, assuming the primary illegal conduct, is whether "the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun* v. *United States,* 371 U.S. 471, 488 (1963); *Harrison* v. *United States,* 392 U.S. 219, 226 (1968).

Consequently, if the Government first learns of the commission of a crime as a result of an illegal search, subsequent investigation which reveals evidence showing the crime cannot be separated from the original illegality no matter how untainted the actual evidence gathering process seems. See *United States* v. *Tane*, 2nd Cir. 1964, 329 F.2d 848; *Smith* v. *United States*, D.C. Cir. 1965, 344 F.2d 545.

This is essentially what Petitioners claimed happened in the present case. Through the illegal surveillances, the Government learned of the "juice" activities of Annoreno, DeRiggi and Milstein. While averments were made that live informants had given information concerning these three prior to the eavesdropping, it is clear that the intelligence obtained from the eavesdropping was the spur for the investigation which led to the instant indictment. This conclusion follows from the use made by the Government of the illegally secured information.

Basically, the FBI used this information in two ways. First, Wolf converted the tape recordings into transcriptions, or logs. Wolf then composed Airtels from the logs. These Airtels contained a summary of the information in the logs, and were sent to Washington and the United States Attorney's office in Chicago. Although the District Judge concluded that these Airtels did not contain any information not included in the logs, and thus did not have to be turned over to defense counsel, he did not consider these documents in the light of their true value as summary accounts containing observations and conclusions drawn from the eavesdropping intelligence. In any event, the defense was prevented from learning the name of the individual in Washington to whom these Airtels were sent, and the pur-

pose behind their being sent. (H.Tr. 214-17, 434-5) this ruling effectively prevented the defense from ascertaining what derivative use was made of the intelligence information.

Finally, Wolf composed six reports using, in part, the intelligence obtained from the illegal surveillances. One of these reports mentioned Annoreno in connection with the so-called Buccieri organization, and alluded to his involvement in the juice business. These reports were sent to the Organized Crime Section in Washington and to the United States Attorney's office in Chicago.

Thus, although not by means of the logs themselves, the information concerning the defendant's involvement in the juice business with the so-called Buccieri organization was disseminated to Washington and the United States Attorney in Chicago. The defense, however, was almost completely forestalled in its efforts to find out what these organizations, especially Washington, did with the information. It did learn three points, however.

First, it learned that the same office to which the Airtels and the reports had been sent ordered that a case file be opened on Annoreno. (H.Tr. 442) The defense also learned that the first FBI Agent assigned to the case on Annoreno read the tainted Wolf report concerning Annoreno's juice activities with the Buccieri organization. (H.Tr. 670-1) Finally, it learned that Assistant U. S. Attorney Adelstein had read the Airtels and the reports while he was assigned in Washtinton (H.Tr. 621-2), that he continued to read whatever was sent to the United States Attorney's office after his transfer to Chicago (H. Tr. 622), and that he was the causal factor behind the allegedly independent investigation of Annoreno commenced by the IRS. (H.Tr. 646, 733, 754) From these points on, the paths led to the ultimate surveillance of the Family Amusement Center and the establishment of this case.

Proof in this case that the IRS investigation and subsequent FBI investigation of Annoreno, De Riggi and Milstein was spurred and pressured by the initial unlawful eavesdropping was impeded by several rulings of the trial judge denying petitioners access to important documents and reports. In a sense, the hearing enabled the defendants to show the skeleton of the investigative taint, but denied them the opportunity to show its sinews. We point to the following examples where rulings of the trial judge prevented the petitioners from making this showing:

We have already alluded to the ruling by which the defense was precluded from learning to whom, in FBI Headquarters in Washington, the Airtels were sent, and why. Since later orders to the FBI in Chicago to open a "case file" on Annoreno emanated from this office, the information was essential to the defense. Also, Assistant United States Attorney Adlestein, who provided the initial information and the spur for the IRS investigation, while he was in Washington with the Justice Department, read these and Wolf's other reports concerning Annoreno. Thus it was important to the defense to know the use to which Washington put these reports in directing activities of the local FBI and in, possibly, instigating the IRS investigation.

Sather, who was the first FBI agent to conduct a formal investigation of Annoreno on directions from Washington, filed periodic reports of his investigation. Again, Adlestein had access to and probably read these reports. When Sather commenced his investigation he looked over the December 1963 Wolf report on Buccieri which mentioned Annoreno's connection with juice activities. Later, Sather and Wolf had a conversation with Annoreno in which Annoreno's involvement in juice was mentioned. Yet the trial judge denied the defense access to Sather's reports,

Wolf's December 1963 reports, and Sather's memoranda concerning the conversation with Annoreno. Again, these documents would have enabled the defense to show how the intelligence from the electronic surveillance was employed in the investigation of Annoreno, De Riggi and Milstein.

IRS Agent Potrykus' report, actually detailing what Potrykus had been told by Adelstein and the document which prompted the local office of the IRS to commence an investigation of Annoreno, was denied the defense. Similarly, the trial judge refused to allow the defense to find out the substance of Potrykus' conversations with Stern and whether the IRS Agents had received any information from the FBI concerning Annoreno's juice activities. These matters were essential to the defense for the purpose of showing how the FBI attempted to cleanse itself of the taint of the unlawful surveillance by referring the investigation of these petitioners to the IRS.

The defense was forced, by a ruling of the trial judge, to accept the statement of FBI Agent Roemer that a report prepared by him did not contain information gleaned as a result of the electronic surveillance. Roemer's report was important because it, too, had been provided the IRS, obviously by and through Washington (H.Tr. 794), and it was read and considered by Agent Stern as part of his investigation of Milstein. Stern later conveyed to FBI Agent Dallman information concerning the presence of some of these petitioners at the Family Amusement Center, and thus provided the immediate cause of the FBI's eventual surveillance of that location. Thus it was essential to the defense to see those portions of Roemer's report dealing with these defendants' alleged juice activities so that they might effectively cross examine Roe-

mer concerning the sources of his information. Cf. *United States* v. *Rohalla,* 7th Cir. 1966, 369 F.2d 220; *United States* v. *Alexander,* 4th Cir. 1961, 326 F.2d 736.

Each of these items were essential to the defense's claim that the FBI had tried in this case to cleanse itself of the initial taint of an illegal surveillance by shifting the investigation of Annoreno, De Riggi and Milstein to the IRS. Only by uncovering what went on in the form of liaison, or unofficial direction from Washington, between these two agencies could the defense firmly establish what had already been strongly suggested by the evidence available. Under these circumstances, Annoreno, De Riggi and Milstein were denied the full and fair hearing into the issue of taint to which they were constitutionally entitled.

4. Failure to grant hearing on Milstein's Motion to Suppress Evidence.

The opinion of the Court of Appeals, in considering Petitioner Milstein's claim that his Fourth Amendment Rights were violated by the search for, seizure, use and introduction into evidence of two address books, failed to note that the "evidence" upon which its decision was based had not been given at any hearing, but had been supplied by affidavit. Milstein's request for a hearing into his claims went unheeded.

Surprisingly, few authorities have examined the right of an aggrieved party to have factual issues in these situations determined at a hearing, rather than by affidavit. (See, Rule 41(e), Federal Rules of Criminal Procedure, 18 U.S.C.A.; *United States* v. *Foley,* 2nd Cir. 1960, 283 F. 2d 582; *Hoffritz* v. *United States,* 9th Cir. 1956, 240 F.2d 109; *Jackson* v. *United States,* D.C.Cir. 1964, 336 F.2d 579.) Certainly, in the circumstances of this case, a hearing was

warranted, for several of the premises stated by the Court of Appeals are based upon a unilateral reading of affidavits.

For example, the opinion of the Court assumes that the search of Milstein at F.B.I. offices was incident to his arrest. A hearing, however, might just as reasonably show that a search of Milstein's person had already been made while he was still at his premises, and that the search in the F.B.I. offices was literally a general, exploratory search. Under these circumstances a serious question exists whether agents have a right to seize everything in an arrested person's immediate possession upon the prospect that further investigation would develop a use for the objects. See *State* v. *Elkins*, 422 P.2d 250 (Oregon S.Ct. 1966). It is possible, we submit, to determine these issues only after a hearing.

CONCLUSION

For the above and foregoing reasons we respectfully urge the Court to grant this Petition for Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioners

SHERMAN C. MAGIDSON
LOUIS CARBONARO
on the Brief

APPENDIX

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1971 — JANUARY SESSION, 1972

No. 71-1233

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

STEVE ANNORENO, ANTHONY RENO, ANTHONY SPILLONE, VITO SPILLONE, LOUIS DE RIGGI, JOHN KOBYLARZ, ALBERT MILSTEIN, GEORGE VERTUCCI, ANTHONY DELGALLO and MARTIN BUCARO,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 69-CR-699 — EDWIN A. ROBSON, *Judge.*

Argued February 4, 1972 — Decided May 26, 1972

Before SWYGERT, *Chief Judge,* HASTINGS, *Senior Circuit Judge,* and SPRECHER, *Circuit Judge.*

SPRECHER, *Circuit Judge.* After a lengthy jury trial, the defendants were convicted on a single count indictment charging them with conspiring to make extortionate exten-

sions of credit in violation of 18 U.S.C. 892(a).[1] Sentences

[1] The Extortionate Credit Transactions Act, 18 U.S.C. §892, provides in pertinent part:

"(a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

"(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate. . . .

(1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor.

• • • •

(2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(3) At the time the extension of credit was made, the debtor reasonably believed that either

(A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or

(B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

(4) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

"(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any

ranging from three to 15 years' imprisonment were imposed by the district court and, in three instances, additional $10,000 fines were exacted. This appeal attacks those convictions on the basis of the sufficiency of the evidence, the government's use of improperly obtained wire-tap evidence, and various trial court errors.

The government's proof consisted of testimony by 26 witnesses who testified that they had on one or more occasions borrowed money from the defendants. This testimony was designed to establish that the defendants were joint participants in the business of lending money at usurious rates of interest upon the usually tacit, but frequently openly expressed, understanding that force and violence would be employed against borrowers who defaulted or were tardy in repaying the principal and interest. In addition, the government produced FBI agents who had witnessed certain of the transactions, and through these agents introduced photographs showing various defendants and their victims in front of the pool hall where the repayments were allegedly made. The government's evidence further showed that the loans were gnerally made upon one of two conditions; one arrangement provided that the borrower would pay each week a specified

(footnote continued)

of the circumstances described in subsection (b) (1) or (b) (2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension."

rate of interest, usually referred to by the participants as "juice," until such time as he repaid the principal in a lump sum; the other involved a "package deal" whereby the borrower would repay a specified sum each week for a specified time, usually ten weeks, until the total was repaid. Under the former arangement, the interest rates ranged from five to ten percent per week; under the "package deal," the borrower would generally pay between 50 and 100 percent more than he borrowed.[2]

The pattern of loan transactions related by the government's witnesses is strikingly similar. A borrower, having contacted one of the defendants or their associates, would obtain cash loans without the credit investigation or financial statements required in ordinary loan transactions. Collateral was never required and the agreements were always oral in nature. All but four of the borrowers testified that they understood when they procured a loan that they or a member of their family could be hurt if they failed to meet the repayment schedule. Their understanding of what might happen if they failed to repay the loans was often implied from the circumstances surrounding the transactions, but there was substantial testimony that defendants frequently coupled their loans with express admonitions against default. These took the form of threats: "We'll send the boys out looking for you," or "You're liable to get hurt," or "You could end up in a

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[2] The loans ranged in amounts from $100 to $2,500, typical terms being $5 a week "juice" on a $100 loan or $25 a week interest on a $250 loan. Other loans required payments of $30 a week for ten weeks to pay back a $200 loan or $80 a week for ten weeks to pay back a $400 loan.

trunk or something.'"[3] In two cases, these threats of physical violence were followed by actual violence.

Payments were generally made in the evening at the Family Amusement Center, a pool hall owned by several of the defendants, or at a barber shop which was freqented by the defendants. When payments were made at the barber shop, it was always after business hours;

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[3] While several witnesses testified that they were never expressly intimidated with respect to repayment of the loans, a significant number gave evidence of specific threats by the defendants. For example, government witness Barnes testified that, when he obtained his initial loan from defendant Steve Annoreno, he as told that he would have to pay it off or "we'll send the boys out looking for you." Similarly, government witness Olsen was told by Annoreno to be sure to make his payment every week because "I don't want to have to come looking for you." When Olsen missed two payments, defendants De Riggi and Vito Spillone stood menacingly on either side of him while Annoreno said, "Don't miss another payment and don't ever make me come looking for you." Annoreno told another witness, "We have ways of collecting." Defendant Spillone warned yet another borrower to stop missing payments or he was "liable to get hurt." Defendant Bucaro was even more explicit, telling one borrower ho had missed several payments that he could "end up in a trunk or something" if he continued to be delinquent That same defendant warned another government witness that he would be beaten up if he did not "get the money up." Similarly, defendant Annoreno threatened one of his borrowers with violence to him or his family if he continued missing payments. Defendant Milstein used a more subtle approach, warning two different borrowers that their names would be "turned in" if they missed payments, and yet another that he "should not be fooling around with these guys, they're nobody to be playing with." Defendant Kobylarz informed one of his borrowers who had fallen in arrears in his juice payments that "there was no way he could continue to protect (him)."

the borrower would find one of the defendants waiting in the dark. It was at these locations that the FBI employed surveillance techniques which allowed agents to photograph borrowers making payments to numerous defendants. As proof of the existence of a joint enterprise and conspiracy, the government pointed to the fact that repayment could be made to any of the defendants, not just to the defendant who negotiated the loan. Further, although the borrowers were held responsible to the defendant from whom the loan was actually secured, the threats of physical violence for delinquency came from defendants who frequently had not been involved in the original loan.

I

Although the government's proof related to transactions dating back to 1966, the statute under which the defendants were indicted was not enacted until May 29, 1968. Prior to that time, the conduct for which these defendants were indicted was not a federal crime. The defendants objected to the relevancy of testimony concerning transactions prior to the enactment of the statute. The trial court allowed such testimony into evidence to establish the existence of an agreement, but did instruct the jury that, in order to find the defendants guilty, it had to find that the agreement continued to exist subsequent to the enactment of the Extortionate Credit Transactions Act and that some act in furtherance of the agreement occurred thereafter.

Defendants' objection to this evidence is two-fold: First, they contend that such proof is irrelevant since the transactions prior to May 29, 1968, were not illegal; and second, they urge that the admission of such evidence without adequate limiting instructions was highly prejudicial.

As defendants acknowledge in their brief, courts have generally held that evidence of acts done pursuant to an agreement made prior to statutory proscription of such an agreement may be introduced to show the formation of the agreement, its nature and scope, and its continuity beyond the effective date of the statute. *Parr* v. *United States*, 255 F.2d 86 (5th Cir.), *cert. denied*, 358 U.S. 824 (1958); *Christianson* v. *United States*, 226 F.2d 646 (8th Cir. 1955), *cert. denied*, 350 U.S. 994 (1956); *Nyquist* v. *United States*, 2 F.2d 504 (6th Cir.), *cert. denied*, 267 U.S. 606 (1924).

The relevance of the pre-May 29, 1968, transactions is readily apparent. The defendants were obviously engaged in a continuing course of conduct which began several years before the statute took effect and did not change afterward.[4] In extending credit after the operative date of the statute, they necessarily relied upon and used the impressions created in the minds of potential borrowers by actions and utterances which occurred before the enactment of the statute. For example, borrowers who were threatened with physical violence in the event of nonpayment of loans negotiated prior to enactment were certain to understand the extortionate nature of loans procured subsequent to enactment. If pre-enactment transactions could be relied upon by the defendants to communicate the actual terms of post-enactment loads, they would clearly be relevant to the issue on trial. In addition, they are admissible to show knowledge with respect

[4] The pattern established prior to the enactment of section 892 continued unabated up until the indictments were returned. Payments on pre-enactment loans continued to be received and at least ten new loans were made. Indeed, only three of the government's witnesses had concluded their loan payments prior to May, 1968.

to each defendant's participation in the enterprise's post-enactment activities.

The admission of such evidence, it is true, should be followed by a limiting instruction informing the jury of the purpose for which it can consider the proof. However, we cannot accede to defendants' view that such limiting instructions were ineffective in this case simply because they were not given contemporaneously with the admission of the evidence. An adequate charge was given prior to the jury's retirement and we believe that instruction clearly set forth the limits within which the evidence could be used.[5]

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[5] The trial court instructed the jury to give separate consideration and render separate verdicts with respect to each defendant. In addition, the jury was instructed that to convict the defendants, the government was required to prove beyond a reasonable doubt that there was a conspiracy to make extortionate extensions of credit, that this conspiracy was in existence on May 29, 1968, and that an overt act in furtherance of this conspiracy as committed after that date. Thoes instructions read:

"To convict any of the charge in the indictment the Government must prove beyond a reasonable doubt:

"(1) That a conspiracy existed to make extortionate extensions of credit in violation of Section 892 of Title 18, United States Code;

"(2) That this alleged conspiracy was in existence after May 29, 1968. If you find that the alleged conspiracy was in existence after May 29, 1968, then you may consider as evidence of that alleged conspiracy acts, conversations, and declarations, made before May 29, 1968, which were in furtherance of that alleged conspiracy; and that

"(3) During the existence of the conspiracy, and after May 29, 1968, at least one overt act as set forth in the indictment was committed by one or more members of the conspiracy in furtherance of the objectives of the conspiracy.

"To convict any particular defendant of the conspiracy

II

The defendants argue that this court, in reviewing sufficiency of the evidence, should look only at transactions occurring after May, 1968. In light of the analysis in part I, we have rejected their contention and have reviewed all the evidence introduced at trial.

Viewing the evidence in the light most favorable to the government, we find that there is ample evidence to support the conviction of all the defendants except Anthony Reno. With a single exception, the government clearly established the existence of an active conspiracy to make extortionate loans.

The defendants, acknowledge that loans were made and that the interest rates on those loans were excessive, argue that the government failed to prove that the loans were extortionate in nature. This contention is based on the defendants' belief that the "understanding" required by section 891 (6) of the statute must be express rather

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(footnote continued)

charged in the indictment, the Government must prove beyond a reasonable doubt that

"(1) A conspiracy existed to make extortionate extensions of credit in violations of Section 892 of Title 18, United States Code;

"(2) This conspiracy was in existence after May 29, 1968;

"(3) The particular defendant was knowingly and willfully a member of this conspiracy and that he was aware of the common purpose and was a willing participant with the intent to advance the purpose of the conspiracy, and that

"(4) During the existence of this conspiracy, and after May 29, 1968, at least one overt act as set forth in the indictment was committed by one or more members of the conspiracy in furtherance of the objectives of the alleged conspiracy."

than implicit. They further contend that the "subjective belief" of a borrower that failure to repay the loan would be dealt with violently is insufficient to establish extortion unless that belief has a "factual basis" in the evidence. Applying this theory to the evidence, defendants Kobylarz and Delgallo argue that their convictions cannot be allowed to stand since no government witnesses testified that they were ever expressly threatened by these two defendants. They merely believed that they would be in danger of physical violence if they failed to meet their payment schedules.

We believe that this argument is based on an erroneous premise. The term "understanding" as used in this statute should not, as defendants argue, be interpreted as requiring an agreement. Rather, it should be given its primary meaning of comprehension.[6] Clearly, Congress could not have intended to punish only those loan sharks foolish enough to make the terms of the loan explicit and to exempt those who convey the nature of the transaction by subtle hints and innuendo. Where the threat of violence exists and is comprehended by the victim, the extortionate nature of the transaction is present and punishable under this statute.

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[6] Webster's Third New International Dictionary of the English Language, Unabridged (1961), at 2490, gives, as the primary meaning of the word, "[t]he Act of grasping mentally; comprehension, discernment, interpretation." An alternate meaning of "[a] mutual agreement not formally entered into but in some degree binding on each side" is given as definition number 4c. The Random House Dictionary of the English Language (1966) states the primary meaning of the word to be "mental process of one who comprehends; comprehension; personal interpretation." An alternate meaning of "a mutual agreement, especially of a private, unannounced, or tacit kind" is given as the sixth definition.

Thus, the inquiry into whether the borrowers had a factual basis for their comprehension of the consequences of default need not be restricted to a search of the record for explicit threats.[7] On the contrary, the inquiry should be whether the record as a whole discloses a reasonable basis upon which the borrowers might have predicated their fear that default or delinquency might result in harm to themselves or their families. Our review of the record compels the conclusion that the nature of these transactions, in which oral, unsecured loans were made at rates of interest often 30 times the commercial rates with provision for nefarious repayment at such places as street corners, taverns, pool halls and closed barber shops, would inform the average borrower in metropolitan Chicago that the loans were extortionate in nature. As this court noted in *United States* v. *Prochaska*, 222 F.2d 1, 2 (7th Cir.), *cert. denied*, 350 U.S. 836 (1955), "words or phrases take their character as threatening or harmless from the context in which they are used, measured by the common experience of the society in which they are published."

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[7] Contrary to defendants' contention, it is of no significance that express extortionary language was not directed to all the borrowers or that some of the borrowers were first threatened when they became delinquent in their repayments rather than when they initially obtained their loans. The defendants were charged with conspiring to make credit extensions which were intended to be extortionate, not with the substantive violations. Therefore, the actual understanding of specific borrowers was not an element of the conspiracy with which defendants were charged. The government need only have proved that the defendants planned and intended that those to whom they extended credit would understand the possible harmful consequences of default or delinquency. See Carbo v. United States, 314 F.2d 718, 740-41 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964); United States v. Compagna, 146 F.2d 524, 528 (2d Cir. 1944), cert. denied, 324 U.S. 867 (1945).

As to the remaining defendants, all but Reno were clearly shown to have knowingly and actively engaged in this extortion venture. The government's evidence of defendant Reno's involvement in the extortion conspiracy is, however, much less convincing. Indeed, his only connection with the conspiracy was his acceptance of several payments intended for defendant Annoreno. Government witnesses Shearn and Barnes testified that they made loan payments to Reno, who stated that he would see that the money got to Annoreno. Neither witness testified to any act or statement by Reno which would indicate that he had any knowledge of the extortionate nature of the loan.

Proof of knowledge on the part of a participant in an alleged conspiracy is an essential element of the offense. *United States* v. *Turnipseed*, 272 F.2d 106 (7th Cir. 1959); *Morei* v. *United States*, 127 F.2d 827 (6th Cir. 1942). Without some proof upon which the jury could impute knowledge to defendant Reno, the conviction cannot be allowed to stand. We conclude, therefore, that the evidence of defendant Reno's involvement in the conspiracy is insufficient to sustain his conviction. As to all other defendants, it is clearly sufficient.

III

The defendants also challenge their convictions on the basis of the district judge's refusal to grant their request for a bill of particulars naming all the persons to whom extortionate loans were allegedly made. This, they acknowledge, is tantamount to a request for a list of prospective government witnesses which is admittedly unavailable to them under existing authority. *United States* v. *Cansler*, 419 F.2d 952 (7th Cir. 1969), *cert. denied*, 397

U.S. 1029 (1970); *United States* v. *Addonizio,* 451 F.2d 49 (3d Cir. 1971). But they argue that such information was absolutely essential to the preparation of an adequate defense to the charges against them.

This argument is predicated upon the First Circuit's holding in *United States* v. *Tomasetta,* 429 F.2d 978 (1st Cir. 1970). That case, while at first glance apposite to the situation before us, is distinguishable. *Tomasetta* involved an attack upon an indictment for the substantive offense of extortionate loan sharking. There, the First Circuit reversed a conviction because the indictment had failed to provide an adequate description of the act charged.

In the instant case, however, the indictment does not charge the substantive offense but rather a conspiracy to make extortionate extensions of credit. The difference is significant with respect to defendants' argument that the refusal of their request for a bill of particulars prevented them from adequately preparing their defense. They charge that without knowledge of the specific parties to whom they allegedly made loans, they were unable to "explain and demonstrate the lack of substance of the expressed fear of those who borrowed money" or "establish a lack of fear by the borowers at the times in question." These issues, however relevenat to an indictment for the substantive offenses, are not defenses to the conspiracy charge against the defendants. On the contrary, the essence of this indictment was the intent to create an atmosphere of intimidation and fear with respect to the loans made, not the actual accomplishment of that intent in particular instances.

While we cannot deny that the production of the information requested might have facilitated the preparation of the defense, we do not believe that this information

was so essential to that defense as to warrant the circumvention of the well established rule that the government is not required to disclose the identity of its witnesses. *See United States* v. *Addonizio, supra.* Thus, having failed to discern any prejudice resulting from the denial of defendants' request, we hold that the refusal to order a bill of particulars was not error. *United States* v. *White,* 370 F.2d 559 (7th Cir. 1966). As the defendants recognize, this is a matter resting within the discretion of the trial judge. *United States* v. *Rimanich,* 422 F.2d 817 (7th Cir. 1970); *Hickman* v. *United States,* 406 F.2d 414 (5th Cir.), *cert. denied,* 394 U.S. 960 (1969). We do not believe the district judge abused that discretion in denying this request.

IV

Finally, the defendants have raised two distinct questions arising under the Fourth Amendment. First, it is argued that the convictions of defendants Annoreno, De Riggi and Milstein must be reversed because of the government's use of information gained by admittedly unlawful eavesdropping. Second, defendants contend that an illegal search which produced an address book listing names of borrowers contaminated defendant Milstein's conviction.

As to the question of electronic surveillance, the district court conducted a five-day *Alderman* hearing into possible taint from this surveillance and concluded that there had been no use of illegally acquired evidence. At that hearing, the government successfully showed that none of the information obtained by the wiretaps was used either at trial or in furtherance of the investigation of these defendants. As noted in *Alderman* v. *United States,* 394 U.S. 165, 183 (1969), once the defendant is furnished with the

intercepted conversations, the burden is on him to come forward with specific evidence demonstrating taint. It is only after such a showing of taint that the ultimate burden falls on the government to prove that there was no taint. *United States* v. *Battaglia*, 432 F.2d 1115, 1117 (7th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971). We have reviewed the evidence adduced at this hearing and are convinced both that the government made full and adequate disclosure of the surveillance and that the products of that surveillance were not used in either the investigation or prosecution of the defendants. As defendants admit, most of the information so obtained was without probative value in this case, and that information which conceivably was of use was demonstrated to have been obtained contemporaneously from other sources. In such situations, the government adequately meets its burden of showing a lack of taint from the illegal activity.

With respect to the second question, defendant Milstein urges that his conviction be reversed because the government obtained the names of three witnesses who testified against him through a search which the defendant believes was made in violation of his Fourth Amendment rights. The search in question occurred when FBI agents, under the authority of a valid search warrant, conducted a search of Milstein's restaurant for stolen property unrelated to this indictment. During the course of that search, the agents discovered an address book which contained records of Milstein's juice loans. Later the same day, in a search of Milstein's person after his arrest for the possession of stolen property, a second address book containing similar information was found. From these books the government obtained the names of three witnesses who testified against the defendant.

Milstein argues that the first address book was improperly seized since it was discovered after the agents had found the stolen property described in the warrant and was therefore beyond the reach of the warrant. The government, while not conceding the invalidity of the search under the warrant, argues that the first address book was properly seized in a search incident to a lawful arrest.

In determining the validity of this search, this court must apply the rules governing searches incident to lawful arrest which were in effect prior to the Supreme Court's decision in *Chimel* v. *California,* 395 U.S. 752 (1969), because *Chimel* has been limited to prospective application. *Williams* v. *United States,* 401 U.S. 646, 651 (1971). While this search would present substantially more difficult problems under the rules enunciated in *Chimel,* the pre-*Chimel* decisions compel our conclusion that the agents discovered the address book while properly inspecting the premises which were under Milstein's control. *United States* v. *Rabinowitz,* 339 U.S. 56, 61 (1950); *Harris* v. *United States,* 331 U.S. 145, 151-52 (1947). Similarly, the agents had the right to search Milstein's person even though that search was not conducted contemporaneously with the actual arrest. As the Fifth Circuit noted in *United States* v. *Gonzalez-Perez,* 425 F.2d 1283, 1287 (5th Cir. 1970), "[A] search of an arrestee is still incident to an arrest when it is conducted shortly thereafter at the jail or place of detention rather than at the time and place of arrest." *See also Ray* v. *United States,* 412 F.2d 1052 (9th Cir. 1969); *Rodgers* v. *United States,* 362 F.2d 358 (8th Cir.), *cert. denied,* 385 U.S. 993 (1966); *Baskerville* v. *United States,* 227 F.2d 454 (10th Cir. 1955).

Having concluded that the evidence was sufficient to sustain all the convictions except that of defendant Anthony Reno, and that the trial was free of prejudicial error, the conviction of defendant Reno is reversed and the remaining convictions are affirmed.

AFFIRMED IN PART,
REVERSED IN PART.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.